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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE NICHOLAS ARENA,

Defendant and Appellant.

2d Crim. No. B204183
(Super. Ct. No. 1182621)
(Santa Barbara County)

Appellant was charged with two counts of second degree commercial burglary (counts 1 & 3, Pen. Code, § 459),¹ two counts of petty theft with a prior (counts 2 & 4, § 484, subd. (a)/666) and one count of failure to appear while on bail (count 5, § 1320.5). The information alleged that the offense was committed while appellant was released from custody (§ 12022.1, subd. (b)), that he had been convicted of three serious or violent felony offenses (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and served three prior prison terms (§ 667.5, subd. (b)).

Appellant moved to bifurcate the trial on his prior convictions. He waived a jury trial on count 5, the failure to appear, and its enhancement of

¹ All further statutory references are to the Penal Code unless otherwise stated.

committing an offense while on bail. He also waived a jury trial on the prison and the strike priors. He admitted the petty theft prior conviction charged in counts 2 and 4. Appellant was convicted by jury of counts 1 and 3 (second degree commercial burglary) and counts 2 and 4 (petty theft). At a bench trial, the court found him guilty of count 5 and its enhancement. It found that appellant had served three prior prison terms and found five strike prior allegations true.

Appellant filed a motion to reduce the offenses to misdemeanors and to dismiss the strike prior allegations, which was denied. The court imposed a sentence of 75 years to life, consisting of consecutive sentences of 25 years to life on counts 1, 3 and 5 pursuant to the Three Strikes law. It stayed the sentences on counts 2 and 4 pursuant to section 654, and imposed and stayed the three prior prison term enhancements. (§ 667.5, subd. (b).)

Appellant claims the trial court erred in denying his motion to reduce his felonies to misdemeanors or refusing to strike a prior conviction. He further asserts that his sentence constitutes cruel and unusual punishment. We affirm.

FACTS

Counts 1 Through 4

On February 28, 2006, appellant was captured on camera shoplifting video games from a Sears store in Santa Maria. A security officer followed appellant and obtained his license plate number and a description of his car. Another security officer, Benjamin Powell, wrote a report indicating that he believed eight to ten games were missing and reported the incident to the Police Department.

Two days later, Powell saw appellant in the store again. He grabbed a shopping bag from behind a register, put some video games in it, and walked out of the store. Powell and two other security personnel flagged down a police officer who apprehended appellant. Inside the bag were 11 or 12 Playstation2 games, worth approximately \$129. Sears security tape had been stuck on the bag.

The tape is generally placed on oversized items by Sears staff to prove the item has been purchased. No games had been purchased at the store on either day.

During the booking process, a police officer found over \$4,000 in cash in appellant's possession. Appellant told the officer that it made no sense for him to steal video games when he had that much money. He said he was sick and had a problem with stealing.

Count 5

Bail was set at \$50,000 and appellant posted a bail bond. On May 22, 2006, he appeared in court and out of custody. However, on June 5 he failed to appear, and a warrant was issued for his arrest. On August 12 he was arrested in Sacramento County. Appellant admitted to the officer that he was running from outstanding arrest warrants.

Prior Conviction and Prior Prison Term Allegations

The prosecution presented evidence that, in 1986 and 1992, appellant committed two first-degree burglaries in Los Angeles County (case Nos. KA015640 & A538044). In 1984, 1986 and 1992, he committed three residential burglaries in Clark County, Nevada (case Nos. C76270, C76079 & C117327). Following confusion over the jurisdictions in which the sentences were served, the parties stipulated that appellant served three prior prison terms within the meaning of section 667.5, subdivision (b).

Motion to Reduce Felonies to Misdemeanors and Strike Prior Conviction

On June 25, 2007, the probation officer filed a pre-plea report, noting appellant's prior convictions and arrests. During the previous 42 years, he had incurred 22 convictions, all theft-related offenses. The probation officer noted that appellant has spent most of his adult life committing thefts and being incarcerated. He began gambling at age 17, but has never received treatment.

Appellant moved to reduce his convictions to misdemeanors pursuant to section 17, subdivision (b)(3), or to dismiss the prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th

497. Appellant argued that his theft offenses were the result of his "pathological gambling" addiction. He asserted that he fell outside the spirit of the Three Strikes law because his last residential burglary was 13 years ago, his offenses have all been nonviolent and he suffers from serious health problems. He has had prostate surgery, has urinary problems, high blood pressure, and suffers from obesity. Appellant will require lifelong treatments and monitoring of his kidney function. He contended that, because he is 60 years old, a sentence of 25 years to life is essentially a death sentence.

Sentencing Hearing

The court considered a supplemental probation report, which listed four factors in aggravation and none in mitigation. Appellant's counsel argued that, but for appellant's prior record, the current offenses would have been charged as misdemeanors. The court refused to reduce the felonies to misdemeanors, stating "[t]here's no way I would 17(b) this. Not with the prior history."

Appellant's counsel contended that justice would be served by dismissing appellant's prior strikes, placing him on probation, and allowing him to participate in Gambler's Anonymous. She noted there was no such program in prison, thus he would be unable to obtain treatment if incarcerated. Moreover, appellant was in ill health, had been "strike-free" for 11 years and his prior convictions pre-dated the Three Strikes law.

The trial court declined to strike appellant's prior convictions, stating that he continued to commit offenses while out on bail or his own recognizance. The court noted that the most recent offenses were the theft of video games, but emphasized the seriousness and risk in appellant's commission of the prior residential burglaries. The court indicated it was aware of its discretion to strike a strike, but chose not to exercise it. "[I]'m not going to strike the strikes. It's just not appropriate in this case. As much as I would like to, I can't say I'd like to only give him a couple of years in prison and therefore I will strike the strikes and accomplish that. That would be legal gymnastics. [¶]

While it might be nice to do for [appellant], it doesn't mean I'm doing my job, [and] what I'm supposed to do which is to follow the law [¶] So I'm not going to exercise my discretion. I know I have discretion to strike the strike." The court then sentenced appellant to 75 years to life in state prison.

DISCUSSION

Denial of Motions

Appellant contends the trial court abused its discretion in refusing to reduce his felonies to misdemeanors pursuant to section 17 subdivision (b)(3)² and in denying his *Romero* motion to strike his prior convictions. He argues that all of his strike offenses and convictions predated the Three Strikes law, thus he should not be subject to its provisions.

We review a court's ruling on a section 17 subdivision (b) motion for an abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) In making its ruling, the trial court must consider the nature and circumstances of the offense, the defendant's attitude towards the offense, or his traits of character as evidenced by his behavior and demeanor at trial. (*Id.* at p. 978.)

The court did not abuse its discretion. Petty theft, second degree burglary and failure to appear are all "wobblers," punishable by one year in county jail or state prison. (§§ 461, 1320.5) Appellant committed the present offense while on felony probation. He posted bail, returned to court once while out of custody and then failed to appear. He was arrested two months later, running from his warrants. Appellant has demonstrated his inability to take his probation

² "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17, subd. (b)(3).)

seriously or to take responsibility for his actions. Although appellant's offenses have been nonviolent property offenses, the trial court noted the seriousness of his residential burglaries, and the danger he presented to the community.

Nor did the trial court abuse its discretion by refusing to strike appellant's prior strike convictions. A trial court has limited discretion under section 1385 to strike prior convictions in Three Strikes cases. The court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review the denial of a section 1385 motion under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

The court indicated that it was aware of its authority to strike, but concluded that appellant "falls squarely within the three strikes" sentencing scheme. In 1984, 1986 and 1992, he committed three residential burglaries in Nevada. In 1986 and 1992 he committed two residential burglaries in California. Appellant was released in 2004 after 11 years in prison. In 2005 and 2006, he committed two theft-related offenses, followed by the present matter. Appellant began gambling at age 17, yet after 40 years and numerous arrests and periods of incarceration, he does not appear to have sought treatment and continues to steal to support his addiction. Appellant has not shown that the court abused its discretion in denying his *Romero* motion.

Cruel and Unusual Punishment

Appellant contends that his sentence of 75 years to life constitutes cruel and unusual punishment under the state and federal Constitutions. (Cal. Const., art. 1, § 17; U.S. Const., 8th Amend.)

The Eighth Amendment to the United States Constitution "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271.) But the "gross disproportionality principle reserves a constitutional violation for only the extraordinary case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 77 (*Andrade*).) Under the California Constitution, punishment is disproportionate if it "shocks the conscience" considering the offender's history and the seriousness of his offenses. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Appellant's circumstances are strikingly similar to those in *Andrade* and *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*) in which the U.S. Supreme Court rejected an Eighth Amendment challenge where the defendant was convicted of a "wobbler" and given a third strike life sentence for theft-related crimes. (*Andrade, supra*, 538 U.S. at p. 77; *Ewing*, at pp. 17-20.)

In *Andrade*, the defendant was convicted of two counts of petty theft with a prior, after stealing \$150 worth of videotapes from K-Mart. (*Andrade, supra*, 538 U.S. at pp. 67-68.) His prior strikes were three counts of residential burglary and he was sentenced to two consecutive terms of 25 years to life under the Three Strikes law. (*Id.* at pp. 66-68.) In *Ewing*, the defendant was convicted of grand theft and sentenced to 25 years to life under the Three Strikes law, after stealing a set of golf clubs. His prior strikes included three residential burglaries and a robbery. (*Ewing, supra*, 538 U.S. at pp. 18-20.) Appellant had five prior serious felony convictions when he was convicted in the present matter for the theft of video games. His sentence is not grossly disproportionate to his crime and is justified by the State's interest in deterring recidivist felons. (*Id.* at pp. 29-30.)

When faced with recidivist defendants such as appellant, "California appellate courts have consistently found the Three Strikes law is not cruel and unusual punishment." (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359.) Appellant's sentence conforms to sentences for repeat offenders under the Three Strikes law and is proportionate to sentences for repeat offenders in other states.

(See e.g., *People v. Romero* (2002) 99 Cal.App.4th 1418, 1433 [25 years to life for theft of magazine]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1338 [25 years to life for theft of clothing]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [25 years to life for theft of pants].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

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